Supreme Court, U.S.
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87-1316

Civil Action Number ____

THE UNITED STATES SUPREME COURT

Term: October 1987

IN RE: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER THE PROPRIETORSHIP

APPENDIX

ON WRIT OF MANDAMUS AND PROHIBITION
IN THE ALTERNATIVE TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT ISSUE

L. Napoleon Cooper
2400 16th Street, N.W., #545
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(202) 483-0684
Pro se

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Text of U.S. District Court Order (Judge Harold H. Greene), Civil Action No. 86-0373, February 12, 1986

ORDER

Upon consideration of plaintiff's motion for a temporary restraining order and accompanying memoranda, exhibits and affidavits, it is this 11th day of February, 1986

ORDERED that defendants RCA Corporation and General Electric Corporation file, on or before February 12, 1986, a preliminary response to plaintiff's motion.

Text of U.S. District Court Order (Judge Harold H. Greene), Civil Action No. 86-0373, July 29, 1986

ORDER

In accordance with the Memorandum issued this date, it is this 29th day of July, 1986

ORDERED that this action be and it is hereby dismissed under Fed. R. Civ. P. 11 as to all defendants with prejudice.

Text of U.S. District Court Memorandum (Judge Harold H. Greene), Civil Action No. 86-0373, July 29, 1986

MEMORANDUM

Plaintiff L. Napoleon Cooper, proceeding pro se, seeks declaratory, injunctive and compensatory relief under section 14(e) of the Williams Act, 15 U.S.C. Sec. 78n(e) and various other statutes. The defendants have moved to dismiss under Fed. R. Civ. P. 11, arguing that the action is frivolous and brought in bad faith.

The gravamen of plaintiff's complaint is that certain of the defendants neglected to disclose to stockholders of the RCA Corporation plaintiff's November 21, 1985 offer to purchase 4.99% of the shares of RCA for approximately $300 million. RCA shareholders subsequently voted -- on February 13, 1986 -- to accept a merger with defendant General Electric Company valued at $6.3 billion. That same day, this Court refused to issue a

temporary restraining order halting the proposed merger, after concluding that many of plaintiff's allegations were of dubious credibility and that he could not demonstrate a likelihood of success on the merits.

The Court need not speculate further on the precise motivations that led plaintiff to initiate his tender offer and this suit. Defendants have established beyond peradventure that plaintiff could not possible obtain the funds needed to underwrite his "offer" for RCA stock. Indeed, no reasonable person in plaintiff's position could realistically expect to consummate such an offer were it accepted by the shareholders. More importantly, no reasonable shareholder would treat plaintiff's proposal seriously. Thus, whether plaintiff's offer and this litigation were instituted for malevolent or altruistic purposes, it is clear that plaintiff's proposal could not be considered material to any RCA shareholder contemplating the GE-RCA merger. Section 14(e) of the

Williams Act is designed "to ensure that [investors] will not be required to respond [to a tender offer] without adequate information." Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975)). RCA shareholders were not deprived of adequate information with respect to either Cooper's tender offer (if it was such under the statute) or General Electric's tender offer, because Cooper's proposal was frivolous. Cooper's lawsuit to enforce section 14(e) is similarly frivolous, and properly dismissed under Rule 11. See Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979); Brown v. District Unemployment Board, 411 F. Supp. 1001 (D.D.C. 1975).

Accordingly, this action will be dismissed. An appropriate order accompanies this Memorandum.

Text of U.S. Court of Appeals Order, CA No. 80-99363, July 30, 1987

O R D E R

Upon consideration of the Motion to have this Court of Appeals Request that the United Shareholders Association (Independent Third Party) file an Amicus Curiae Brief in this Action and the Opposition and Reply thereto, it is

ORDERED by the court that the motion to have this court request that the United Shareholders Association file an amicus curiae brief in this action be denied. The United Shareholders Association has not sought leave to file an amicus curiae brief itself, and the appellant has not shown that such a brief would be helpful in deciding this appeal. It is

FURTHER ORDERED by the court, on its own motion, that the parties show cause within fifteen days of the date this order is filed why the district court order dismissing

appellant's complaint pursuant to Rule 11 of the Federal Rules of Civil Procedure should not be summarily affirmed for the reasons stated by the district court or on another basis.

The Clerk is directed to send a copy of this order to appellant both by certified mail, return receipt requested, and by first class mail.

Per Curiam

Text of U.S. Court of Appeals Order, CA No. 80-00373, August 18, 1987

O R D E R

Appellant's suggestion that this appeal be heard initially en banc, filed September 8, 1986, has been circulated to the full Court. No member of the Court requested the taking of a vote on the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that appellant's suggestion is denied.

Text of U.S. Court of Appeals Order, C.A. 86-00373, October 9, 1987

O R D E R

Upon consideration of the order to show cause why the district court's order should not be summarily affirmed, and the responses thereto, it is

ORDERED by the court that the order to show cause be discharged. It is

FURTHER ORDERED by the court that the district court order dismissing appellant's complaint be summarily affirmed for the reasons set forth in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Text of Court of Appeals Memorandum, C.A. No. 86-7005, October 9, 1987

MEMORANDUM

On February 10, 1986, L. Napoleon Cooper, proceeding pro se, filed this action against the RCA Corporation ("RCA"), General Electric Company ("GE"), Dow Jones Company, Inc. ("Dow Jones"), the Wall Street Journal, Lazard Freres & Company, and various directors and officers of those defendants. Cooper alleged that the defendants committed fraud by conspiring to withhold from shareholders information about his offer for RCA stock in violation of Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. Sec. 78n(e) (1982). See Complaint at paragraphs 90-118. He also alleged that Dow Jones and its officers violated Section 1 of the Robinson-Patman Act, 15 U.S. C. Sec. 13 (1982), by refusing to sell advertising space to him. See id. at paragraphs 119-29. Cooper sought damages of $78 million and

declaratory and injunctive relief.

On July 29, 1986, after numerous submissions from the parties, the district court granted a motion to dismiss the action under Rule 11 of the Federal Rules of Civil Procedure as frivolous, and Cooper noticed his appeal. This court issued an order to show cause why the district court's order should not be summarily affirmed for the reasons stated by the district court or on another basis; the parties' responses to that order are now before the court. We summarily affirm the district court's dismissal.

I.

The district court dismissed this action as frivolous under Rule 11 of the Federal Rules of Civil Procedure. It cited two cases, Rhinehard v. Stauffer, 638 F.2d 1169 (9th Cir. 1979), and Brown v. District Unemployment Board, 411 F. Supp. 1001 (D.D.C. 1975). These cases, however, were decided before Rule 11 was revised in 1983. Prior to the revision, Rule 11 stated: "If a pleading

is not signed, or is signed with intent to defeat the purpose of this rule; it may be stricken as sham and false and the action may proceed as though the pleading had not been served." See 2A Moore's Federal Practice and Procedure paragraph 11.01[3] (1987). That provision was deleted in the 1983. The Advisory Committee Notes explain:

> The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56.

(Citations omitted.) Under Rule 11, as amended in 1983, dismissal of a complaint as frivolous is not appropriate. Therefore the district court erred in relying on Rule 11.

II.

"It is clear, though, that we may affirm a district court on grounds other than those upon which it relied." United States International Trade Commission v. Tenneco West, 822 F.2d 73, 80 (D.C. Cir. 1987). In

this case the district court should have granted the motion to dismiss on the ground that Cooper failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, all Cooper's claims are without merit.

A.

In Courts I, II and II of his complaint, Cooper alleges that the defendants committed fraud by conspiring to withhold information about his offer for RCA stock in violation of Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. Sec. 78n(e) (1982). See Complaint at paragraphs 90-118.

Section 14(e) was enacted in 1968 as part of the Williams Act and is a general proscription against fraud in connection with tender offers. See Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 22-24 (1977). This section applies only when a tender offer has been made. See Lewis v. McGraw, 619 F.2d 192, 195-96 (2d Cir.), cert. denied, 449 U.S. 951 (1980); Voisin v. Bartell Media Corp.,

[1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) paragraph 98, 486, at 92,845-46 (S.D.N.Y. 1982). Congress, however, intentionally did not define the term "tender offer." See Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 56 (2d Cir. 1985).

Cooper's complaint and affidavit filed in district court make clear that Cooper never made a tender offer. His various letters refer only to prospective plans for "offers" that were never carried out. See, e.g., Complaint at paragraphs 33-35 (September 16, 1985 letter from Cooper to various defendants "to advise that the Proprietorship and the Charity have joined forces and are preparing to make an offer to purchase ... equity directly from ... shareholders."). Cooper does not allege that he ever made an offer to purchase RCA shares to the public generally or to any RCA shareholder. Because there was not solicitation, Cooper failed to state a claim under section 14(e).

B.

In Court IV of his complaint, Cooper claims that Dow Jones violated the Robinson-Patman Act, 15 U.S.C. Sec. 13 (1982), by refusing to sell advertising space to him. See Complaint at paragraphs 119-29. The Act provides:

> It shall be unlawful ... to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition.

15 U.S.C. Sec. 13(a) (1982) (emphasis added). Newspaper advertising, however, is not considered a commodity for purposes of the Act. See Ambook Enterprises v. Time, Inc., 612 F.2d 604, 609 (2d Cir. 1979), cert. denied, 448 U.S. 914 (1980); National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 84-86 (D.D.C. 1977), aff'd mem., 595 F.2d 888 (D.C. Cir. 1979). Therefore, Cooper has plainly failed to state a Robinson-Patman Act claim.

C.

In Count IV of his complaint, Cooper claims that Dow Jones and several of its officers and employees violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. Sec. 1 (1982), by conspiring among themselves to refuse to sell advertising space to Cooper. See Complaint at paragraphs 119-29. That claim, however, does not constitute a violation of section 1 of the Sherman Act. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984) ("officers or employees of the same firm do not provide the plurality of actors imperative for a Sec. 1 conspiracy."

Cooper also alleges that GE and RCA conspired with Dow Jones to refuse to sell advertising space to him and thereby restrain trade in RCA stock. See Complaint at paragraph 121. Cooper alleged that he suffered a loss in excess of $78,750,000 because he has been forced to forego his planned purchase of RCA stock. See Complaint at paragraph 135.

He also alleged that he suffered a loss of $15,750,000 by reason of the RCA-GE merger. See id. These damage claims are frivolous in light of the fact that Dow Jones' refusal to publish Cooper's advertisement did not prevent him from otherwise purchasing RCA stock. Cooper's complaint therefore fails to allege that he suffered any injury to his trade or business cognizable under the antitrust laws. See Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983).

Text of U.S. Court of Appeals Order, CA No. 86-7005, November 10, 1987

O R D E R

Upon consideration of appellant's petitioner for rehearing, it is ORDERED, by the Court, that the petition is denied.

Complaint Extracts

8. Upon information and belief, defendant Dow Jones & Company, Inc., is a corporation organized under the laws of the State of Delaware and authorized to do business under the laws of the District of Columbia and the State of New York and others, and has its principal place of business at 22 Cortlandt Street, New York, New York 10007 and others at 1025 Connecticut Avenue, N.W., Washington, D.C. Defendant Dow Jones & Company, Inc. ("Dow Jones") is the owner of the Wall Street Journal, a national and international newspaper, in which offers to purchase, tender offers and invitations to tender are routinely advertised to reach the most shareholders with news of offers on the basis of equal timeliness. It is alleged that defendant Dow Jones conspired with one or more of the defendants or others to violate the Securities Act (Sec. 14(e)), the Sherman

Act (Sec. 1) and the Robinson-Patman Anti-Discrimination Act (Sec. 13(e)) as alleged herein and against whom a declaratory judgment and treble damages are sought by the plaintiff.

54. The plaintiff made it clear however that subsequent to the December 2, 1985 date he would be publishing the offers to purchase and advising shareholders of his efforts with management in the WSJ (for starters), with or without benefit of their interaction.

55. November 25, 1985. About this time, the plaintiff inquired of the WSJ as to what was holding up the clearance for the charitable discount for the full page advertisements designed to announce the offers to purchase made to the target companies' managements. Wooten of the Washington office of defendant WSJ advised the plaintiff that the charitable discount request had been denied by the New York brass and that he had no reasons to tell the plaintiff except that defendant Cummings of

the national staff was expecting to get a call from the plaintiff.

62. The plaintiff then advised defendants Welch (of GE) and Frederick (of RCA) of his decision to approach certain sophisticated shareholders having already begun to seek them out. The plaintiff in his notice to the defendants (dated November 29, 1985) reserved the option to proceed publicly with the advertisements (in the event he was proven incorrect about the WSJ's motives). The correspondence was designed to have the effect of putting defendants Welch, Frederick and Rohatyn on notice that the plaintiff had not been stopped by the WSJ's illegal behavior if that is what was expected. Instead, the November 29, 1985 letter was designed to give the impression to the Defendants that in due course RCA and GE shareholders would be finding out about the superior offers in spite of all attempts, legal or obviously otherwise, to keep word of the offering terms and conditions out of the

public eye.

63. December 4, 1985. About this time the plaintiff began to dig for evidence that the WSJ had been in contact with some or all of the relevant companies, supplied them confidential financial and other information about the plaintiff, and had agreed to never sell him the advertising space he desired. The plaintiff contends that in a trial on the merits, discovery will show conclusively that the contacts between the parties in fact did take place and that the WSJ deliberately conspired to keep the plaintiff's relevant invitation to tender -- material information concerning the offers to purchase -- away from RCA, GE and other stockholders. In order for the plaintiff to confirm his theory, he placed a call to the General Counsel, Mr. Skinner, of Dow Jones, the party most familiar with the original offer from the plaintiff to purchase Dow Jones. Defendant Skinner did not return the plaintiff's telephone calls but Mr. David E. Moran

of Dow Jones (in-house counsel's office) did.

73. The Tender Offer. The plaintiff on November 21, 1985 submitted to RCA management (defendant Frederick) an offer to purchase to wit the following:

74. Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Formal Offer to Purchase, at $66.17 Face Amount Each, 4.999%, or 4,484,103 Shares, of RCA Corporation Common Stock (Whichever Is Less); Subject Only to a Negotiated Acquisition Pact and/or to the Tender to the Offer By Holders of a Controlling Interest, 80%, or 71,760,000 Common Shares (Whichever Is Less).

75. This formal offer will add to my claim of good faith that every effort was made to illustrate (1) just why and how the consent and/or approval of shareholders representing a controlling interest of RCA common is sought, (2) for senior management/directors the fact that the Project 76 -

AAA, Inc. securities exchanged in part for RCA common are exempt from SEC registration requirements, and (3) that our intention has always been to conduct and promote the offer to purchase in compliance with all SEC 14-d regulations, notwithstanding the fact of our legal exemption from same based on the limited percentage of total common shares outstanding (4.999%) sought in the original offer to purchase.

76. While senior management/directors are not required to issue 14-d(9) or 14-e(2) statements until this offer has been published, let me say that it would be a reasonable exercise of fiduciary duty to issue a voluntary 14-e(2) and/or 14-d(9), Position of Subject Company and/or Solicitation/Recommendation statement in connection with this offer.

77. The offer to purchase provides $66.17 (including 1995 upgrade) in face amount, marketable, asset-backed securities with a combined "effective" taxable cash

coupon of $6.50 and a renewable minimum $21.51 Treasury-recognized, year-of-acquisition, tax deduction per share (see attached chart) as per the following:

(a) A 30-year, $20.00 face valued Project 76 - An American Affair Inc. asset-backed debt security* with a "staggered coupon" and its principal guaranteed (non-callable, negotiable) per share pro rated;

(b) One minimum $21.51 year-of-acquisition (1985 tax year) marketable asset-backed tax deduction (per share) subject to "non-cash" option (c) below. (The deduction is exempt from all proposed minimum taxes, but for a shareholder to qualify for the $21.51 tax benefit, he is required to list the distribution to the charity in his name as income) (see chart);

(c) A nominal payment of $2.50 cash or an option exchangeable for one $46.17 face amount (including 1995 upgrade when dedicated) "New RCA" debt security which is negotiable, asset backed and non-callable and

which includes at each point of maturity a new minimum $21.51 charitable tax deduction renewable every tenth year thereafter, backed by post-acquisition "New RCA" assets;

(d) Subject to 80%, controlling interest, or 71,760,000 shares being tendered (whichever is less), pro ration will apply. However, this Offer to Purchase will then be amended and revised to become an offer to purchase a minimum controlling interest of all RCA shares outstanding (i.e., Schedule 14d-1 filing with the SEC).

78. The plaintiff submitted to the defendant Frederick of RCA the following chart to outline on a face amount only (not value) basis what could be associated with the offer in an environment where a 30-year Treasury bond was competitively priced to yield 9.8225%.

RCA Corporation
OFFER TO PURCHASE
CHART

CURRENT COMMON STOCK DIVIDEND.....	$1.04
AS A PERCENT OF CURRENT NYSE PER SHARE MARKET VALUE*.....	2.3%
TENDER OFFER DEBT COUPON.....	**$3.25**
AS A PERCENT OF CURRENT STOCK DIVIDEND (YEARS 1-5, 11-15 & 21-25 ONLY).....	312.5%
AS A PERCENT OF PER SHARE MARKET VALUE (YEARS 1-5, 11-15 & 21-25 ONLY).....	7.18%
TENDER OFFER DEBT COUPON EFFECTIVE YIELD.....	**$6.50**
AS A PERCENT OF PER SHARE CURRENT COMMON STOCK DIVIDEND.....	625%
AS A PERCENT OF PRINCIPAL FACE AMOUNT REDEMPTION VALUES.....	9.82%
AS A PERCENT OF COMMON STOCK "NYSE" CURRENT SHARE PRICE.....	**146.2%**

83. The plaintiff further states that the offer is exempt from the SEC filing requirement under 14(d)-1, 15 U.S.C. Sec. 78n(d), because the plaintiff in his November 21, 1985 formal offer requested tenders from no more than 4.999% of the total outstanding and reserved the option and accepted a requirement, if shareholders desired (through tender of 80% or more), to make a 14(d)-1

filing (afterward only) making the offering terms and conditions available to all RCA shareholders.

86. The defendants knew or had every reason to know that an offer that represented a significant minimum value premium of $2,844,900,000 (up to $6,051,609,000) over the market price of $45.25 (September 16, 1985) and significantly ($16.89 to $52.52 per share) in excess of the GE offering price was material information and that for management and directors to withhold this information or as the defendant WSJ did, to block publication of the offer in consultation with the defendants RCA and GE and/or other shareholder managements was a clear violation of the spirit, intent and consequences of Section 14 of the Securities Exchange Act of 1934, and 15 U.S.C. Secs. 1 and 13(e) (anti-trust laws) 1982.

94. The plaintiff alleges that the motive of the agreement was to intentionally conceal the true intent of the defendants to

deceive, manipulate and in effect defraud RCA shareholders and to deny, in violation of the Securities Exchange Act of 1934, the plaintiff an opportunity to purchase RCA shares. The objective of the misrepresentation (material non-disclosure) on the face of it constitutes an attempt to deceive and to conceal material information from RCA shareholders.

106. The intent of the agreement among defendants was this material omission and it was to deceive and manipulate the ultimate decision of shareholders and Board members to sell shares or recommend the sale of securities. When the Board was advised by management that the plaintiff's offer had been received along with a management request that Lazard Freres & Company would not stand independently on their fairness opinion without indemnification, it should have demanded to know why and was at best grossly negligent to do otherwise.

120. The plaintiff believes agreement was reached to constrain the Plaintiff's right to purchase and RCA shareholders right to sell securities (trade) in violation of the Sherman Act, and the Robinson-Patman Act, and that the defendants Dow Jones, & Company, Inc.; Warren H. Phillips, Dow Jones Chairman & Chief Executive Officer; Peter G. Skinner, Dow Jones Vice President, Corporate Secretary and General Counsel; David E. Moran, Dow Jones Counsel; William Cummings, Dow Jones National advertising Director for the Wall Street Journal intentionally and deliberately (conspired) agreed to restrain (substantial and unreasonable restraint) (blocked) the plaintiff's access to the defendant WSJ's advertising facilities on equal footing with other offer to purchase advertisers (effectively preventing RCA and other target shareholders from receiving material information and causing as of this filing $78,750,000 in damages to the plaintiff and a greater amount of injury to the public) in

violation of the securities and antitrust laws in the following manner.

121. The plaintiff believes that the defendants above did agree to implement a scheme to block said access and accordingly with each of the following points is in violation of securities laws Sec. 14(e) and anti-trust laws Sections 1 and 13(e).

122. The above agreed to prevent the publication of the plaintiff's offer by refusing to sell any advertising space in the WSJ to the plaintiff in consultation with the management of GE and RCA and/or other target companies and/or competitors. The defendants' action was designed to interfere (restraining trade in securities, injure the public, conspire to and substantially and unreasonably restrain trade) with the purchase of RCA and other securities by the plaintiff and with the sale of said securities by RCA and other shareholders.

125. Therefore, the defendants' actions were intended to deceive RCA and other

shareholders of public companies for the purpose of willfully deceiving, manipulating and defrauding shareholders and to do so by limiting the number and types of purchasers that could advertise offers to purchase in the publication. The defendant would only publish the plaintiff's offers if and when the plaintiff got the permission of managements (RCA and others), as stated to the plaintiff by the defendant Cummings and Moran in violation of equal access and in effect restrain his right to trade and excluding him from the principal business of contesting corporate control and other matters.

128. The defendants above did agree (conspire) to implement a scheme to block (restrain trade substantially and unreasonably with due intent to injure the public) said access and accordingly are in violation of the Williams Act, the Sherman Act and the Robinson-Patman Anti-Discrimination Act.

129. Prevention of the publication of the plaintiff's offer by refusing to sell ad space to the plaintiff in consultation with managements of GE and RCA and others, is an action designed to interfere with the purchase of RCA securities by the plaintiff and with the sale of securities by RCA shareholders.

134. The fact that material information was deliberately withheld from the official proxy filed with the Securities and Exchange Commission suggests a violation and an attempt to defraud the RCA shareholders and was the result of the defendants' actions from whom damages are sought. The fact that the restraint of trade was deliberate, the result of conspiracy, substantial and unreasonable, and with the intent to do injury to the public, also suggest that a violation and an attempt to restrain trade was the result of the Count IV defendants' actions.

135. By reason of the practices and

restraints heretofore alleged the plaintiff has been damaged in its business in the following respects:

(a) It has been forced to forego RCA and/or other shareholder fundraising for the public charity and the purchase of RCA and/or others for himself and the charity, whereby plaintiff has suffered a loss in excess of $78,750,000.00.

[Mobil Corporation letterhead, 150 East 42nd Street, New York, New York 10017]

April 8, 1985

Dear Mr. Cooper:

My associates and I have carefully considered the materials you have made available for us, and I have reported them on our telephone conversations.

....Your approach will succeed if, but only if, the anticipated interest payments on the bonds to be issued would have a fair value at or approaching their aggregate stated value, discounted, of course, for the time value of money. This quite clearly can be the case only if, as you suggest, those payments are backed by Mobil's assets. This would be done by increasing the leverage position of Mobil, i.e., increasing its indebtedness in relation to its equity and, in effect, distributing the increase to the equity holders....

Thank you for your interest in Mobil, and for sharing this imaginative concept with us.

Sincerely yours,

Louis Hering

October 1, 1985

Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Acquisition of RCA Corporation

Dear Mr. Frederick:

As per my letter to you of September 16, 1985.

I am writing to advise that my letter to you regarding the proposed acquisition of RCA Corporation ... was ... a studied notification of interest on the Proprietorship's part to undertake an "Offer to Purchase" the RCA Corporation....

Accordingly, the confidential "Offer to Purchase" will be forwarded to your attention.

Please stand by.

Sincerely,

November 21, 1985

Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Formal Offer to Purchase, at $66.17 Each, 4.999%, or 4,484,103 Shares, of RCA Corporation Common Stock (Whichever Is Less); Subject Only to a Negotiated Acquisition Pact and/or to the Tender to the Offer By Holders of a Controlling Interest, 80%, or 71,760,000 Common Shares (Whichever Is Less).

Dear Mr. Frederick:

Not that one could fault your company's strategy, but I am writing as promised to continue (for the record) the pre-offer consultation process begun with my letters of September 16, and October 1, 1985 and to advise, among other things, that we have reconsidered and decided against making an offer to acquire all of RCA Corporation's

("RCA") common stock. Our new course of action may, however, result in a revision of this offer and the ultimate acquisition of RCA via a 14d-1 tender offer filing with the Securities and Exchange Commission.

While there was little surprise here when management rejected outright the prospect of corporate reorganization, you will be required (SEC rules), once the offer is duly published, to respond in writing to each and every shareholder with regard to this offer to purchase.

I can accept a degree of responsible skepticism or even a self-survival reaction from management rooted in a desire for autonomy (i.e., continued diverse share ownership), but you may be assured that in a direct and inexpensive manner I will face down any and all challenges (legal, accounting, tax and financial) to the concept's viability, notwithstanding that management will no doubt expend shareholder financial resources on acquisition expertise of

questionable value.

If management proceeds along this line, only the sophisticated investor (followers of financial media) and arbitraguer will benefit from the imminent and initial publication of the offer. Others, deprived of management's views, could end up selling into the open market too early or too late should a tender offer for controlling interest result and a corollary no-common-dividend, post-acquisition policy be instituted. (And those aspects of a successful offer which may have been expected to affect shareholders financially should have been of paramount fiduciary responsibility.)

Management might consider that after the fact any shareholder could say that it was incumbent upon management to insure, where possible, that the purported value of my proposal (or any proposal) to the stockholders had a realistic basis, to insure that an orderly fair market was maintained in the Company's common stock within the framework

of federal and state laws and the rules of the New York Stock Exchange, and to have assumed that any release of information to the public over which the Company could have executed some control was fully supported by facts.

Hence, this correspondence will add to my claim of good faith that every effort was made to illustrate (1) just why and how the consent and/or approval of shareholders representing a controlling interest of RCA common is sought, (2) for senior management/ directors the fact that the Project 76 - AAA, Inc. securities exchanged in part for RCA common are exempt from SEC registration requirements, and (3) that our intention has always been to conduct and promote the offer to purchase in compliance with all SEC 14-d regulations, notwithstanding the fact of our legal exemption from same based on the limited percentage of total common shares outstanding (4.999%) sought in the original offer to purchase.

Today, however, while senior management/directors are not required to issue 14-d(9) or 14-e(2) statements until this offer has been published, let me say that it would be a reasonable exercise of fiduciary duty to issue a voluntary 14-e(2) and/or 14-d(9), Position of Subject Company and/or Solicitation/ Recommendation statement in connection with this offer.

OFFER TO PURCHASE

The offer to purchase provides $66.17 (including 1995 upgrade) in face valued, marketable, asset-backed securities with a combined "effective" taxable cash coupon of $6.50 and a renewable minimum $21.51 Treasury-recognized, year-of-acquisition, tax deduction per share (see attached chart) as per the following:

(A) A 30-year, $20.00 face valued Project 76 - An American Affair Inc. asset-backed debt security* with a "staggered coupon" and its principal guaranteed (non-callable, negotiable) per share pro rated;

(B) One minimum $21.51 year-of-acquisition (1985 tax year) marketable asset-backed tax deduction (per share) subject to "non-cash" option (C) below. (The deduction is exempt from all proposed minimum taxes, but for a shareholder to qualify for the $21.51 tax benefit, he is required to list the distribution to the charity in his name as income) (see chart);

(C) A nominal payment of $2.50 cash or an option exchangeable for one $46.17 face valued (including 1995 upgrade when dedicated) "New RCA" debt security which is negotiable, asset backed and non-callable and which includes at each point of maturity a new minimum $21.51 charitable tax deduction renewable every tenth year thereafter, backed by post-acquisition "New RCA" assets;

(D) Subject to 80%, controlling interest, or 71,760,000 shares being tendered (whichever is less), pro ration will apply. However, this Offer to Purchase will then be amended and revised to become an offer to

purchase a minimum controlling interest of all RCA shares outstanding (i.e., Schedule 14d-1 filing with the SEC).

THIS OFFER TO PURCHASE IS ALSO SUBJECT TO:

(1) Voluntary Securities and Exchange Commission registration of Project 76's debt securities.

*NOTE: SEC rules and regulations provide that not-for-profit debt instruments (bonds) may be publicly offered and sold without compliance with the 1933 Act registration provisions or the applicable provisions of the 1934 Act or the Trust Indenture Act of 1939, i.e., the proposed securities constitute exempt securities pursuant to sections 3(a)(2) and (4), 3(a)(12), and 304(a)(4) of those Acts, respectively.

(2) This offer to purchase being published or otherwise initiated by the bidder on or before December 2, 1985.

Please advise in writing (in advance of December 2, 1985) if questions regarding this offer to purchase exist.

Sincerely,

P.S.: This offer to purchase 4.999% is void where prohibited by law pending publication.

Enclosure:
Offer to Purchase Chart
LNC/ch

RCA Corporation
OFFER TO PURCHASE
CHART

COMPANY STOCK SYMBOL[1].....RCA
CURRENT COMMON STOCK DIVIDEND.....$1.04
AS A PERCENT OF CURRENT
NYSE PER SHARE MARKET VALUE.....2.3%
TENDER OFFER DEBT COUPON.....$3.25
AS A PERCENT OF CURRENT STOCK DIVIDEND
(YEARS 1-5, 11-15 & 21-25 ONLY).....312.5%
AS A PERCENT OF PER SHARE MARKET VALUE
(YEARS 1-5, 11-15 & 21-25 ONLY).....7.18%
TENDER OFFER DEBT COUPON EFFECTIVE
YIELD.....$6.50
AS A PERCENT OF PER SHARE
CURRENT COMMON STOCK DIVIDEND.....625%
AS A PERCENT OF PRINCIPAL
FACE AMOUNT REDEMPTION VALUES.....9.82%
AVAILABLE TAX DEDUCTIONS.....$4.30
AS A PERCENT OF DEBT COUPON
(YEARS 1-5, 11-15 & 21-25 ONLY).....132%
TOTAL TAX LIABILITY.....$1.75
AS A PERCENT OF PHILANTHROPY[2]
(YEARS 6-10, 16-20 & 26-30 ONLY).....50%
DEBT ISSUES FACE AMOUNT MARKET VALUE[3]..$66.17
AS A PERCENT OF DEBT ISSUES'
PRINCIPAL REDEMPTION VALUE.....100%
AS A PERCENT OF COMMON STOCK
"NYSE" CURRENT SHARE PRICE.....146.2%
NUMBER OF SHARES TO PURCHASE
(IN MILLIONS).....4.5

AS A PERCENT OF TOTAL
COMMON SHARES OUTSTANDING..... 4.999%
CURRENT SHARE PRICE USED FOR
CALCULATIONS.....$45.25

1 SEE CORPORATE LIST FOR FULL COMPANY NAME AND OTHER COMPANY INFORMATION.

2 PROJECT 76 - AN AMERICAN AFFAIR, INC. (EXCLUSIVE CHARITABLE BENEFICIARY).

3 DEBT MARKET VALUE EQUALS THE FACE AMOUNT MULTIPLIED BY .098225 (A 9.8225% "EFFECTIVE"[5] COUPON RATE).

4 OR 4.999%, WHICHEVER IS LESS.

5 EFFECTIVE TAXABLE PAYOUT RATE EQUALS 9.8225% OF THE DEBT PACKAGES' PRINCIPAL (FACE AMOUNT) REDEMPTION VALUE, TIMES 10 YRS. (ONE THIRD THE LENGTH OF MATURITY), DIVIDED BY 5, TIMES 50% (50% TAX BRACKET), PAYABLE IN EQUAL AMOUNTS IN YEARS 1-5, 11-15 AND 21-25.

November 29, 1985

Mr. Robert R. Frederick
Chief Executive Officer
RCA Corporation
30 Rockefeller Plaza
New York, NY 10020

Re: Initiation of Acquisition of RCA Equity

Dear Mr. Frederick:

The shareholder tax year has passed for all intents and purposes and you are no doubt fully aware that the Proprietorship has commenced an initiative in which it ... is attempting to negotiate the pre-offer purchase of RCA Corporation ("RCA") common directly and/or to commit certain owners to the tender of their RCA shares prior to the announcement of identical (offer to purchase) terms and conditions to the general public.

....In any event, you may expect to receive from us additional details on the day the offer to purchase is published.

Sincerely,

[Bank of America letterhead, H. Helmut Loring, Senior Vice President, Assistant General Counsel, San Francisco Headquarters]

November 5, 1985

Dear Mr. Cooper:

Mr. Armacost discussed your proposal to acquire BankAmerica Corporation stock briefly with the Corporation's Board of Directors at its meeting of November 4 and I have been instructed to advise you that BankAmerica Corporation has no interest in pursuing your proposal.

Sincerely,

H. Helmut Loring
Senior Vice President and
Assistant General Counsel

(1) U.S. Constitution, 14th Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) U.S. Constitution, 7th Amendment.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S.C. Sec. 28, 1651(a) and (b).

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Federal Rules of Civil Procedure, 12(b)(6), 41(b), 52(a) and 56(e):

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ....(6) failure to state a claim upon which relief can be granted,....A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim

upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The

court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 52. Findings by the Court

(a) Effect.... Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(a) Effect. [Effective on August 1, 1985. See, also, subdivision (a) above.] In all actions tried upon the facts without a

jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

FIndings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 56. Summary Judgment.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his

pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Supreme Court Rules

Rule 26. Considerations governing issuance of extraordinary writs.

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. Sec. 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provisions, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Rule 27. Procedure in seeking an extraordinary writ.

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. Secs. 1651(a), 2241, or 2254(a), shall comply in all respects with

Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3(b) of this Rule), are filed with the Clerk and the docket fee is paid.

.2. (a) If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and

such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

"Appellate Jurisdiction." Black's Law Dictionary. West Publishing Company, 5th Ed.

Appellate jurisdiction. The power vested in an appellate court to review and revise the judicial action of an inferior court, evidenced by an appealable order or an appealable judgment rendered by such a court. Trengen v. Mongeon, N.D., 200 N.W.2d 50, 53. The power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages (i.e., original jurisdiction) but only after it has been finally decided by an inferior court, i.e., the power of review and determination on appeal, writ of error, certiorari, or other similar process. Jurisdiction on appeal; jurisdiction to revise or correct the proceedings in a cause already instituted and acted upon by an inferior court, or by a tribunal having the attributes of a court. Limits of appellate jurisdiction are governed by statutes (e.g. 28 U.S.C.A. Sec. 1291 et seq.) or constitutions.

District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (1984):

4. Federal Civil Procedure, 1772

Before a complaint may be dismissed for failure to state a claim, trial court must determine that allegations do not support relief on any possible theory.

5. Federal Civil Procedure, 1829

For purposes of a motion to dismiss, a complaint is to be construed liberally in favor of plaintiff.

6. Federal Civil Procedure, 1773

Complaint should not be dismissed for failure to state a claim unless it appears that plaintiff could prove no facts in support of his claim which would entitle him to relief.

Doe v. United States Department of Justice, 753 F.2d 1092 (1985):

5. Federal Civil Procedure, 1829, 1835

For purposes of motion to dismiss for failure to state a claim, factual allegations of complaint must be taken as true, and any ambiguities or doubts concerning sufficiency of the claim must be resolved in favor of pleader.

6. Federal Civil Procedure, 1773

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief.

9. Federal Civil Procedure, 1775

A district court should not grant a motion to dismiss for failure to state a claim for failure to seek technically appropriate remedy when availability of some relief is readily apparent on face of complaint. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

Humana, Inc. v. American Medicorp, Inc., 445 F. Supp. 613 (1977):

2. Securities Regulation, 174

Test by which tender offeror's right to sue for injunctive relief under the Williams Act must be determined is whether stockholders of the target company would be benefited if allegations of the complaint are proven to be true and relief requested is granted. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

3. Securities Regulation, 174

Where thrust of tender offeror's complaint against competing tender offeror was to request increased disclosure of the terms of the latter's offer and the character of its management so that target stockholders could more intelligently choose between the competing offers, tender offeror had standing to sue for injunctive relief under the Williams Act. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

Lewis v. McGraw, 619 F.2d 192 (1980):

1. Securities Regulation, 105

Where no tender offer had ever been made to shareholders of target corporation, shareholders could not maintain cause of action for damages under Williams Act. Securities Exchange Act of 1934, Sec. 14(e) as amended 15 U.S.C.A. Sec. 78n(e).

PER CURIAM:

[1] The instant action is a consolidation of five similar lawsuits brought on behalf of McGraw-Hill, Inc. stockholders, alleging that McGraw-Hill and its directors made false statements of material facts in response to two proposals of the American Express Company for the acquisition of substantial amounts of McGraw-Hill stock. The issue before us is whether shareholders may maintain a cause of action for damages under the Williams Act, 15 USC Sec. 78n(e), where they concede that no tender offer has been made to them. We conclude that they may not.

Piper v. Chris-Craft Industries, 430 U.S. 25 (1977):

A

Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously. Department of Air Force v. Rose, 425 U.S. 352, 388-389 (1976) (BLACKMUN, J., dissenting); United States v. Public Utilities Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring); Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942). In this case both sides press legislative history on the Court not so much to explain the meaning of the language of a statute as to explain the absence of any express provision for a pri- vate cause of action for damages. As Mr. Justice Frankfurter reminded us: "We must be wary against interpolating our notions of policy in the interstices of legislative provisions." Ibid. With that caveat, we turn

to the legislative history of the William Act.

In introducing the legislation on the Senate floor, the sponsor, Senator Williams, stated:

"This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967). (Emphasis supplied.)

The same theme of investor protection was emphasized eight months later by Senator Williams on the day the measure was passed by the Senate:

"[The federal securities laws] provide protection for millions of American investors by requiring full disclosure of information in connection with the public offering and trading of securities. These laws have worked well in providing the public with adequate information on which to base intelligent investment decisions.

* * * * *

"There are, however, some areas still remaining where full disclosure is necessary for investor protection but not required by present law. One such area is the purchase by direct acquisition or by tender offers of substantial blocks of the securities of publicly held companies.

> "S.510 ... provides for investor protection in these areas." Id., at 24664. (Emphasis supplied.)

Indeed, the bill as finally enacted by Congress was styled as a disclosure provision: "A bill to provide for full disclosure of corporate equity ownership of securities under the Securities Exchange Ac of 1934." See generally 1 A. Bromberg supra, Sec. 6.3(121), at 116.2.

Confirming the view that the legislation was designed to fill "a rather large gap in the securities statutes," Manuel Cohen, then Chairman of the SEC, testified before the Senate Subcommittee on Securities:

> "[T]he general approach ... of this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts...." Senate Hearings 15.

In response to the suggestion that the legislation would tend to aid entrenched management in warding off potentially beneficial takeover bids, Chairman Cohen testified:

> "But the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a

> pawn in a form of industrial warfare.... The investor is lost somewhere in the shuffle. This is our concern and our only concern." Id., at 178. (Emphasis supplied.)

The legislative history thus shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies....

Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (1984):

1. Federal Civil Procedure, 1773

Dismissal for failure to state claim for relief is proper only when it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

2. Federal Civil Procedure, 1829

On motion to dismiss for failure to state claim for relief, all factual doubts must be resolved and all inferences made in favor of plaintiffs. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

3. Federal Civil Procedure, 1835

On motion to dismiss for failure to state claim for relief, defendant's factual allegations, if in agreement with plaintiff's, only reinforce plaintiff's case; if in disagreement, they must be ignored. Fed. Rules Civ. Proc. Rule 12(b), 28 U.S.C.A.

Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355 (1979):

2. Securities Regulation, 52

Test of materiality under Securities Exchange Act section requiring disclosure and proscribing false or misleading statements in tender offer is that misstatement or omission is material if there is substantial likelihood that reasonable shareholder would consider it important in deciding whether to accept tender offer. Securities Exchange Act of 1934, Secs. 10(b), 14(e), 15 U.S.C.A. Secs. 78j(b), 78n(e).

Securities and Exchange Commission v. Carter Hawley Hale Stores, Inc., 760 F.2d 945 (1985):

3. Securities Regulation, 52

Existence of tender offer is determined by examining the following factors: active and widespread solicitation of public shareholders for shares of issuer; solicitation made for substantial percentage of issuer's stock; offer to purchase made at premium over prevailing market price; terms of offer are form rather than negotiable; offer contingent on tender of fixed number of shares, often subject to fixed maximum number to be purchased; offer is open only for limited period of time; offeree is subjected to pressure to sell his stock; and public announcements of purchasing program concerning target company precede or accompany rapid accumulation of large amount of target company's securities. Securities Exchange

Act of 1934, Sec. 13(e), as amended, 15 U.S.C.A. Sec. 78n(e).

5. Securities Regulation, 52

For purposes of determining whether issuer repurchases during tender offer constitute a tender offer, premium is determined not by reference to pretender offer price but rather by reference to market price.

Voisin v. Bartell Media Corp., [1981-82 Transfer Binder], Para. 98,486, CCH Fed. Sec. L. Rep. 92,839 (S.D.N.Y. 1982):

At the time the August 20, 1976 and January 12, 1977 notices were sent to the shareholders, Downe already had acquired 66% of the Bartell stock and therefore was not in the process of seeking to obtain control of the company: It already had control. The August statement informed the minority shareholders of the fact that, on June 15, 1976, the boards of Bartell and Downe had approved the merger and that, pursuant to Delaware law, the shares of the minority stockholders were cancelled as of September 20, 1976, the effective date of the merger. The notice of January 1977 was essentially the same.

Under the circumstances presented by this case, no tender offer was made. The salient characteristics of a tender offer, not found here, include: 1) contingency of

the offer to purchase stock on the acquisition of a minimum number of shares; 2) specific, limited period of time in which the offer remains open; 3) payment of a premium price in order to solicit shares. In the case at bar, the offer was made in connection with a forced statutory merger by a majority shareholder. The notices stated that defendants would buy the minority's stock, but the offer was not contingent with respect to volume or time. Furthermore, defendants offered what they stated as a fair market price--not a premium price.

For these reasons, the Court holds that the plaintiff has not stated a cause of action under Section 14(e). Defendants motion to dismiss is therefore granted as to that provision.

Weeks Dredging & Contracting, Inc. v. American Dredging Co., 451 F. Supp. 468 (1978):

1. Securities Regulation, 174, 178

Tender offeror had standing under Williams Act to seek preliminary and final injunctive relief against allegedly false and misleading statements made by target company's management. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

2. Securities Regulation, 52

In context of a tender offer, omission of a fact which makes a statement concerning value of target company's shares misleading is material, for value of stock is likely to be an important consideration to shareholder. Securities Exchange Act of 1934, Sec. 14(e), 15 U.S.C.A. Sec. 78n(e).

UNITED STATES SUPREME COURT

IN RE: L. NAPOLEON COOPER d/b/a
LARRY N. COOPER THE PROPRIETORSHIP

Civil Action No. _____

AFFIDAVIT OF SERVICE

I hereby certify that petitioner's Writ Application and Petitioner of February 8, 1988 and Appendix were sent on February 8, 1988 by first class mail service to the following:

Chief Judge Patricia M. Wald
Circuit Judge Abner J. Mikva
Circuit Judge Harry T. Edwards
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

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Skinner, William Cummings and
David E. Moran

L. Napoleon Cooper
In Proper Person

2400 16th St., NW, #545
Washington, D.C. 20009
(202) 483-0684

DISTRICT OF COLUMBIA) ss

I, _____, a Notary Public in and for the District of Columbia, do hereby certify that on this 8th day of February, 1988, personally appeared before me, the said L. Napoleon Cooper, who executed this Affidavit of Service and acknowledged the same to be his act and deed.

Given under my hand and seal this 8th day of February, 1988.

_____
Notary Public

My commission expires: _____